Supreme Court, U.S.
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In the Supreme Court of the
United States

1991-1992 Term

Charles E. Gavette,

Petitioner,

v.

Internal Revenue Service

Respondent.

Petitioner's Reply Brief

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TABLE OF CONTENTS

Page

Petitioner's Reply Brief 1

Table of Contents. i

Table of Authorities ii

Conclusion 12

Certificate of Service of Process. . 13

TABLE OF AUTHORITIES

Federal — Page

Harrison v Marsh
46 FEP Cases 971 (W.D. Mo, 1988) . . 8

Statute

5 U.S.C. 8151 2

29 CFR 1613.403 2

29 CFR 1613.703 9

46 FEP Cases at 976 9

46 FEP Cases at 977 9

FPM Subchapter 3-2(a) and 3-2(b) . . 11

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This Reply Brief is necessitated by the Respondent IRS' insisting that it resurrect the very issue which confused the Courts below, that is the basic nature of Petitioner's claim.

1. Petitioner filed a Complaint alleging handicap discrimination. This is not an appeal from an adverse decision of the Merit Systems Protection Board

[MSPB]. It is an appeal from dismissal of an original action alleging handicap discrimination, based on two right to sue letters from the Equal Employment Opportunity Commission [EEOC].[1] The only connection between the MSPB action and the EEOC-District Court proceeding which is before this Court, is that the IRS revealed for the first time, as part of the MSPB proceeding, that it would not promote Petitioner because of a discriminatory practice.[2] Petitioner then

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[1] Petitioner's EEOC action preceded his MSPB filing. Therefore, pursuant to 29 CFR 1613.403, this Petition is properly before this Court.

[2] Petitioner claims that the IRS discriminated against him because it violated 5 U.S.C. 8151, requiring the agency to notify persons absent because

of work-related injuries of their eligibility for promotion and of available promotion opportunities, and to consider these handicapped persons, such as Petitioner, for promotion, as if he had been present. The IRS, Petitioner claims, failed to accommodate his handicap, because it merely posted notices of promotions on bulletin boards. Such bulletin boards were not accessible to Plaintiff, who, because he was involuntarily retired during the disputed time period (a retirement which was later retroactively rescinded) was denied access to those bulletin boards. Further, Petitioner, and other handicapped persons absent because of work-related injuries, were unable to physically enter the building to review bulletin boards, and, because of the IRS policy of failing to advise these persons they were eligible for promotion, they would never have sought the information about available positions in the first place. Petitioner was further the victim of disparate treatment, as IRS policy requires supervisors to notify persons absent for other reasons, and who are not handicapped, about promotion opportunities, and, for those non-handicapped employees who are absent for other reasons, supervisors are required

presented this discriminatory practice[3] to the District Court as further evidence to support his claim of handicap discrimination. Petitioner did not seek enforcement of the MSPB Order in District Court.

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to fill in interest cards for these employees, to ensure these employees are eligible to be considered for promotion. During the course of an MSPB proceeding which is not the subject of this petition for certiorari, the IRS revealed that it would not consider Petitioner for promotion because he had failed to fill out an interest card. Had Petitioner been absent for any other reason other than his handicap, his supervisor would have filled in the interest card for him.

[3] Petitioner consistently claimed that the fact that the discriminatory practice described in footnote 1 was initially revealed in the course of an MSPB hearing was irrelevant. What was relevant to the District Court proceeding was that the practice existed, and that Petitioner was injured by this practice.

The IRS, however, in its presentations to the Court of Appeals and to the District Court, claimed that Petitioner was seeking such review, thereby irritating and confusing the District Court and the Court of Appeals. Now, the IRS attempts to revive its obfuscation in this Court. Let us be perfectly clear. Petitioner does not ask this Court to consider the MSPB proceedings, or to determine whether he can request a review of an MSPB decision in District Court.

Petitioner did not address any findings of the Merit Systems Protection Board in this Court because he is not appealing any determination of the MSPB.

Whether the MSPB found he was or was not a qualified handicapped person is irrelevant.[4] Indeed, the District Court did not consider that issue.[5] Whether the District Court, on the record before the District Court, and not on the record made in the MSPB litigation, improperly found there was no evidence of handicap discrimination because it used an

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[4] Petitioner did not appeal the MSPB finding that he was not a qualified handicapped person to any Court, nor did the IRS rely on that finding in the District Court.

[5] While arguing everything else possible, whether or not it was relevant, the IRS never did argue to the District Court that Petitioner was not a qualified handicapped person. Accordingly, its ipse dixit argument to the contrary in its answer to the Petition has absolutely nothing to do with any issue before this Court.

improper test, is relevant, and is one of the bases for this Petition.

Respondent succeeded in misrepresenting Petitioner's position to the Courts below. If there is a lack of clarity in the record, it is the direct result of this IRS obfuscation. An agency of the federal government should not be permitted to so abuse the adversarial process. If this Court has any question about what Petitioner really was in Court to achieve, it can look at the Complaint. As this Honorable Court has so often contended, the Plaintiff's Complaint controls the issues before the Court. The issue before the Court was handicap discrimination.

2. It is significant that the IRS does not dispute that it has an affirmative obligation to accommodate the handicapped. This issue was before the District Court and the Court of Appeals, and indeed, both Courts were presented the case of Harrison v Marsh, 46 FEP Cases 971 (W.D. Mo, 1988), which focused the issue in a case in which the context was strikingly analogous to the case at bar. In Harrison, Plaintiff had a radical mastectomy which prevented her from performing continuous typing. The Court, noting that the official general policy of the United States is that "[t]he Federal Government shall become a model employer of the handicapped

individuals", 29 CFR 1613.703, held that a governmental agency had a high burden to meet when confronted with the need to accommodate a handicapped employee. 46 FEP Cases at 976. The Defendant Army's failure to adequately notify Plaintiff of her rights with regard to interviewing for a new position were held to have violated the Act. 46 PEP Cases at 977.

The District Court and the Court of Appeals erred in failing to balance the IRS conduct and policy against the affirmative duty of accommodation,[6] based

[6] In this case, the duty to accommodate could easily have been accomplished, for example, by mailing notices and by advising Petitioner of his eligibility for promotion. The IRS, for example, regularly mails handicapped persons absent because of work-related

on the federal government's legislatively-mandated role as a model employer of handicapped individuals. The Courts erred by shifting the burden to Petitioner to adapt himself, rather than requiring the IRS to demonstrate any hardship other than administrative convenience in order to justify its failure to accommodate Petitioner, and others similarly situated. The Court of Appeals, further, appeared to hold that the administrative convenience of the agency overwhelmed any duty to accommodate that agency's handicapped

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injuries, worker's compensation checks.

workers.[7]

3. This Petition raises a substantial question concerning the duty of a federal administrative agency to comply with the clear language of an administrative regulation requiring it to accommodate employees handicapped as a result of an illness/injury caused by their employment. The question is raised in the context of the burden to

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[7] The requirements of notification and accommodation which apply to handicapped workers apply equally to employees of governmental agencies absent from work because of service in the armed forces. FPM Subchapter 3-2(a) and 3-2(b). The IRS policy, and the holdings of the courts below, require a soldier to give up his or her promotion rights because that soldier cannot leave duty in Iraq to review the IRS bulletin board in Detroit.

accommodate, with the courts below improperly placing the burden on the employee, in direct contradiction of the duty of the federal government to be a model employer of the handicapped.

CONCLUSION

This Petition should be granted.

Respectfully submitted,

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Dated: August 28, 1992

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Internal Revenue Service

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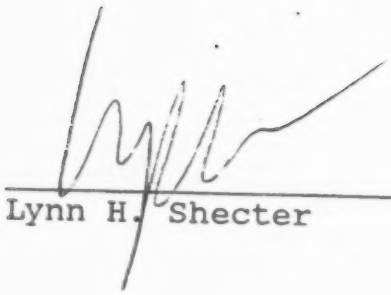
Certificate of Service of Process

LYNN H. SHECTER, certifies that on September 2, 1992, she mailed two copies of Petitioner's Reply Brief and Certificate of Service of Process, upon Kenneth W. Starr, Solicitor General, United States Department of Justice, attorney for Respondents, whose place of business is located at 10th and Constitution Avenue, N.W., Washington,

D.C., 20530.



Lynn H. Shecter